Chai Kheng Lung v Inspector Dzulkarnain Abdul Karim & Anor

HIGH COURT (SIBU) — SUIT NO 22–3 OF 2001
HAMID SULTAN JC
9 OCTOBER 2008

Civil Procedure — Pleadings — Statement of claim — Claim for damages arising out of wrongful detention and false imprisonment — Failure to plead non-disclosure of grounds of arrest and detention — Whether failure to plead such material facts entitled action to be dismissed in limine

Constitutional Law — Preventive detention — Nature of — Whether a constitutionally recognised form of restriction to civil liberty — Whether courts constitutionally empowered to arrest injustice caused by the executive or law enforcement agencies

Preventive Detention — Detention — Whether lawful — Whether court may disturb subjective discretion of detaining authority to arrest and detain individuals — Limited power of court, how exercised

Preventive Detention — Detention order — Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Whether court may disturb subjective discretion of detaining authority to arrest and detain individuals — Limited power of court, how exercised

On 26 May 2000 the plaintiff was performing his duties as a clerk in the Road Transport Department when he was arrested by the first defendant and thereafter detained for 46 days. The plaintiff brought an action for wrongful detention and false imprisonment on the basis that the detention was unlawful and was not made bona fide. The plaintiff gave evidence, inter alia, to the effect that: (i) he was not informed of the grounds of arrest or his continued detention; and (ii) he was handcuffed most of the time and badly treated. However these allegations were not pleaded in his statement of claim. His evidence therefore encompassed facts that were not pleaded. The defendants' defence was that the arrest was lawful and justified in accordance with the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('EO 1969') Ordinance 5/69 and the grounds of arrest and/or detention were made known to the plaintiff.

Held, dismissing the plaintiff's action:

(1) If the plaintiff wished to assert that the imprisonment was not lawful or became unlawful because he did not know and was not told what charge he was being arrested on, or because the imprisonment was endured longer than it was justifiable, the plaintiff should have pleaded such facts — which were material — in the statement of claim. The plaintiff clearly failed to do so. On this ground alone (the plaintiff's failure to plead material facts), the plaintiff's action was liable to be dismissed *in limine*. However, the High Court in the instant case was inclined to adopt a safer approach and deal with the action (see paras 5–6).

(2) Under the EO 1969, the police are given quasi judicial powers to detain a person. There is very little the court can do to disturb their subjective discretion to arrest and detain unless procedural safe guards provided under the Federal Constitution ('Constitution') are breached and/or the act of detention is spiked with malice. There is a greater duty and obligation on the enforcement agencies when dealing with preventive detention, to make sure adequate grounds and where necessary facts leading to the grounds are furnished at the time of arrest or soon thereafter. To demonstrate that the procedural requirements are not breached, the detaining authority ought to give access to solicitors within a reasonable time — the reckoning of which (reasonable time) is a question of fact (see para 18(a)).

(3) In Malaysia, preventive detention is a constitutionally recognised form of restriction to civil liberty, in addition to penal laws. It is seen as a necessary armoury for law enforcement agencies to ensure peace, prosperity and harmony of the nation at the expense of selective individuals. However, this does not mean that the Constitution has not empowered a court to arrest any form of injustice occasioned by the executive or law enforcement agencies, by issuing prerogative orders or directions (see para 19).

(4) In the instant case, the defendants had adequately furnished grounds of arrest and had given immediate access to the plaintiff's solicitors (see para 20).

Observation: The right to detain under preventive detention law does not give the right to abuse the detainee under custody. When a person is detained, he is entitled as of right to food, shelter, medical care, etc. The court has jurisdiction to enquire into any complaint of a detainee, if adequate humanitarian provision is not made by the detaining authority. There is a duty of care imposed on the enforcement agencies to ensure that detainees are well taken care of, failing which they may be held liable to damages. If the

detainees are victims of abuse, criminal prosecution, inclusive of disciplinary proceedings enquiry may be ordered against the perpetrators (see para 20).

[Bahasa Malaysia summary

Pada 26 Mei 2000 plaintif sedang menjalankan tugasnya sebagai kerani di Jabatan Pengangkutan Jalan Raya apabila dia ditangkap oleh defendan pertama dan selepas itu ditahan selama 46 hari. Plaintif telah memulakan tindakan untuk tahanan salah dan pemenjaraan palsu atas dasar bahawa tahanan itu menyalahi undang-undang dan tidak dibuat secara bona fide. Plaintif telah memberikan keterangan, antara lain, bahawa: (i) dia tidak diberitahu tentang alasan tangkapan atau tahanannya yang berterusan; dan (ii) tangannya digari hampir setiap masa dan dia dilayan secara buruk. Walau bagaimanapun dakwaan tersebut tidak diplidkan dalam penyataan tuntutannya. Keterangannya oleh itu melingkungi fakta yang tidak diplidkan. Pembelaan defendan adalah bahawa tangkapan itu sah dan dijustifikasikan menurut Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('OD 1969') Ordinan 5/69 dan alasan tangkapan dan/atau tahanan telah diberitahu kepada plaintif.

Diputuskan, menolak tindakan plaintif:

(1) Jika plaintif berniat untuk menegaskan bahawa pemenjaraan itu tidak sah atau menyalahi undang-undang kerana dia tidak mengetahui dan tidak diberitahu apakah pertuduhan dia ditangkap, atau kerana pemenjaraan itu adalah lebih lama daripada dijustifikasikan, plaintif sepatutnya telah memplidkan fakta-fakta sedemikian — yang penting — dalam penyataan tuntutan. Plaintif jelas telah gagal berbuat sedemikian. Atas alasan ini sahaja (kegagalan plaintif untuk memplidkan fakta material), tindakan plaintif boleh ditolak *in limine*. Walau bagaimanapun, Mahkamah Tinggi dalam kes ini cenderung untuk menggunakan pendekatan yang lebih selamat dan membicarakan kes tindakan tersebut (lihat perenggan 5–6).

(2) Di bawah OD 1969, polis diberi kuasa kuasi kehakiman untuk menahan seseorang. Tidak banyak yang mahkamah boleh lakukan untuk menggunakan budi bicara subjektif mereka bagi menangkap dan menahan kecuali pelindung prosedur yang diperuntukkan di bawah Perlembagaan Persekutuan dilanggar dan/atau perbuatan penahanan itu berasaskan niat jahat. Terdapat kewajipan yang lebih penting dan tanggungjawab agensi penguatkuasaan apabila berurusan dengan penahanan pencegahan, hendaklah memastikan alasan yang mencukupi dan fakta-fakta yang perlu membawa kepada alasan-alasan itu hendaklah diberikan pada masa tangkapan atau sejurus selepas itu.

Untuk menunjukkan yang keperluan prosedur tidak dilanggar, pihak berkuasa yang menahan patut memberikan akses kepada peguamcara dalam masa yang munasabah — dengan menjangkakan (masa munasabah) adalah persoalan fakta (lihat perenggan 18(a)).

(3) Di Malaysia, penahanan pencegahan merupakan bentuk sekatan perlembagaan terhadap kebebasan sivil, yang merupakan tambahan kepada undang-undang penal. Ia kelihatan sebagai suatu keperluan untuk agensi penguatkuasaan undang-undang memastikan keamanan, kemakmuran dan keharmonian negara sehingga ada yang akan menjejaskan individu terpilih. Walau bagaimanapun, ini tidak bermakna yang Perlembagaan tidak memberikan kuasa kepada mahkamah untuk menyekat apa-apa bentuk ketidakadilan yang telah dilakukan oleh eksekutif atau agensi penguatkuasaan undang-undang, dengan mengeluarkan perintah prerogatif atau arahan (lihat perenggan 19).

(4) Dalam kes ini, defendan telah memberikan alasan-alasan untuk tangkapan dan memberikan akses serta merta kepada peguamcara plaintif (lihat perenggan 20).

Pemerhatian: Hak untuk menahan di bawah undang-undang penahanan pencegahan tidak memberikan hak untuk menganiaya orang tahanan di bawah jagaan. Apabila seseorang itu ditahan, dia berhak mendapat hak kepada makanan, pelindungan, penjagaan perubatan dll. Mahkamah mempunyai bidang kuasa untuk menanyakan tentang apa-apa aduan orang tahanan, jika peruntukan kemanusiaan yang mencukupi tidak dibuat oleh pihak berkuasa yang menahan. Terdapat kewajipan berjaga-jaga dikenakan ke atas agensi penguatkuasaan itu bagi memastikan yang orang tahanan tersebut dijaga dengan baik, dan jika gagal mereka boleh dipegang bertanggungjawab untuk ganti rugi. Jika orang tahanan itu mangsa penganiayaan, pendakwaan jenayah, termasuklah siasatan prosiding tatatertib boleh diperintahkan terhadap pelaku jenayah itu (lihat perenggan 20).]

Notes

For a case on whether lawful detention, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1310.

For cases on detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1367–1378.

For cases on nature of preventive detention generally, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2266–2270.

For cases on statement of claim, pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5522–5557.

Cases referred to

Abd Malek bin Hussin v Borhan bin Hj Daud & Ors [2008] 1 MLJ 368 (refd)
Abdul Ghani Haroon v Ketua Polis Negara and another application [2001] 2 MLJ 689 (refd)
Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd)
Associated Press v National Labour Relations Board [1937] 301 US 103 (refd)
Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors [2007] 5 MLJ 441; [2007] 4 AMR 472 (refd)
Christie v Leachinsky [1947] AC 573 (refd)
Haji Khalid bin Abdullah, Re; ex p Danaharta Urus Sdn Bhd [2008] 2 CLJ 326; [2007] 6 AMR 694 (refd)
John Lewis & Co Ltd v Tints [1952] AC 676 (refd)
Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia [1969] 2 MLJ 129 (refd)
Liversidge v Sir John Anderson & Anor [1942] AC 206 (refd)
Mee v Cruikshank (1902) 86 LT 708 (refd)
Minister for Home Affairs, Malaysia & Anor v Karpal Singh [1988] 3 MLJ 29 (refd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969

Augustine Liom (Tang & Co) for the plaintiff.
Iznan bin Ishak (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Hamid Sultan JC:

[1] This is my judgment in respect of the plaintiff's claim in damages for wrongful detention and false imprisonment on the grounds it was unlawful and not made bona fide.

[2] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination in chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

A BRIEF FACTS (THE PLAINTIFF'S VERSION)

[3] The plaintiff's statement of claim is very brief but the evidence encompasses facts which were not pleaded. The relevant part of the statement of claim, inter alia, reads as follows:

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(i) on or about 26 May 2000 at around 3pm while the plaintiff was in his office, the defendant in the course of his employment and in the performance of his functions wrongfully and without lawful justification arrested the plaintiff and thereafter detained the plaintiff for forty six (46) days at the Central Police Station, Sibu and at the Sibu Hospital.

C

(ii) the plaintiff was released unconditionally on the 11 July 2000 at about 3pm.

D

(iii) the plaintiff contends that the arrest and detention of the plaintiff was without lawful justification and was not made bona fide.

(iv) by reason the matters aforesaid, the plaintiff was deprived of his liberty and has suffered loss and damage.

E

The plaintiff therefore claims:

(a) damages for wrongful detention and false imprisonment;

(b) further and other reliefs; and

F

(c) costs.

[4] The defendants' defence was that, the arrest was lawful and justified in accordance with the law, as provided in the Emergency (Public Order and Prevention of Crime) Ordinance 1969, ('EO 1969') Ordinance 5/69.

G

PRELIMINARIES

[5] Three witnesses gave evidence for the plaintiff and eight witnesses for the defendants. The plaintiff in crux was adducing evidence to show that: (i) the plaintiff was not informed of the grounds of arrest or his continued detention; (ii) his arrest on 26 May 2000 and subsequent detention was mala fide.

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I

[6] A quick perusal of the pleading will show that the above allegation was not part of the plaintiff's pleaded case. It is trite that the plaintiff need not allege in the statement of claim that the arrest or imprisonment was unlawful, since the burden of proof is on the defendants to show that it was lawful. On the other hand, if the plaintiff desires to contend that the imprisonment was

or became unlawful because he did not know and was not told what the charge on which he was being arrested was (see *Christie v Leachinsky* [1947] AC 573), or because the imprisonment was endured longer than it was justifiable (*Mee v Cruikshank* (1902) 86 LT 708; *John Lewis & Co Ltd v Tints* [1952] AC 676), he should allege these facts, which are material, in the statement of claim (see *Bullen and Leake and Jacob's Precedents of Pleadings* (12th Ed)). Failure to plead the relevant fact is fatal and the plaintiff's claim on this ground alone ought to have been dismissed *in limine* (see *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770). However, I have taken the safer approach and dealt with the complaint.

EVIDENCE

[7] The plaintiff who was a clerk in Road Transport Department, Sibu (PW1) in his evidence, inter alia, said: (i) he was arrested by the first defendant (DW1) on 26 May 2000; (ii) the first defendant informed that he was arrested under se 3(1) of the EO 1969; (iii) he was immediately allowed legal representation on the same day. His lawyer perused the letter regarding his arrest and asked him to sign the letter at Central Police Station. He signed the letter; (vi) he was earlier arrested on 26 April 2000 and on 5 May 2000 released unconditionally; (vii) he complained that in the 46 days of detention from 26 May to 11 July 2000, he was badly treated, most of the time handcuffed, and subjected to long hours of abusive interrogation, etc.

[8] PW3, the solicitor gave evidence and confirms the evidence of the plaintiff. He does not say as to why he did not ask for grounds, save that he wrote for grounds by a letter dated 14 March 2001, that too nearly ten months after the plaintiff had been released. If there is genuine grievance, the least that is expected of solicitors is that they put the objection in writing immediately and if the detention is unlawful, to apply for writ of habeas corpus. This was not done so in the current case.

[9] The first defendant on the other hand, gave evidence, inter alia, says: (i) the ground of arrest was informed in simple language and exhibited the form titled 'Per: Sebab-sebab di atas tangkapan 5(3) Perlembagaan Persekutuan' informing the plaintiff the grounds of arrest, which the plaintiff has acknowledged; (ii) other documents to justify the arrest were also exhibited.

THE LAW ON PREVENTIVE DETENTION AND EO 1969

[10] Preventive detention law is not something that is new in the

Commonwealth. The learned author BV Kumar in his book on *Preventive Detention Laws of India* has adequately dealt with this subject. The learned author at p 3 says as follows:

> Though the law relating to preventive detention has now been codified in art 22 of the Constitution, its earliest form can be traced to the East India Company Act 1793. Under this Act, provided that:
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> > … it shall and may be lawful for the governor of Fort William aforesaid for the time being to issue his warrant under his hand and seal, directed to such peace officers and other persons as he shall think fit for securing and detaining in custody any or persons suspected of carrying on mediately or immediately any illicit correspondence dangerous to the peace or safety of any of the British settlement or possession in India with any of the Princes, Rajas or Zamindars or any other person or persons having authority in India or with the commanders, Governors or Presidents of any factories established in East India, by an European Power or any correspondence contrary to rules and orders of the said company or of the Governor-General in council of Fort William aforesaid...
>
> Subsequently, the Bengal State Prisoner's Regulation of 1818 provided that in the interests of public tranquillity and security of the State, it may be necessary to place under personal restraints individuals against whom there may not be sufficient ground to institute any judicial proceedings or that cause may not be advisable but in such cases of detained persons the grounds of such determination should from time to time come under revision and the affected persons have the right to bring to the notice of the Governor-General in council all matters connected with the supposed grounds or with the manner of execution of the restraint order; that during detention, the detenue will be confined according to his status with proper allowances for his wants and those of his family; that his properties shall during detention be attached and kept under the management of the revenue authorities etc.

[11] The relevant provision of the EO 1969 which for purpose of arrest and detention need to be considered is elucidated in ss 3 and 4 which reads as follows:

Section 3: Power to detain suspected persons

(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention under section 4(1).

(2) Any police officer may without warrant arrest and detain pending enquiries any person who on being questioned by him fails to satisfy him as to his identity or as to the purposes for which he is in the place where he is found, if the police officer suspects that person of having acted or being about to act or being likely to act in any manner

prejudicial to public order or if he has reason to believe that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained.

(3) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty-days without an order of detention having been made in respect of him under section 4(1):

Provided that —

(a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent;

(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General of Police or to a police officer designated by the Inspector-General in that behalf who shall forthwith report the same to the Minister.

(4) The powers conferred upon a police officer by subsections (1) and (2) may be exercised by any member of the security forces, by any person performing the duties of guard or watchman in a protected place, and by any other person generally authorised in that behalf by a Chief Police Officer.

(5) Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorised generally or specially by the Minister.

Section 4: Power to order detention

(1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order directing that that person be detained for any period not exceeding two years.

(2) Every person detained in pursuance of an order made under sub-section (1) shall be detained in such place as the Minister may

A direct and in accordance with instructions issued by the Minister and any rules made under subsection (3).

(3) The Minister may by rules provide for:

B (a) the maintenance and management of any place referred to in sub-section (2);

(b) compelling persons detained therein to perform such work or duties therein or connected therewith as he considers necessary or expedient; and

C (c) the discipline of persons detained therein:

Provided that until any such rules are made under this sub-section and thereafter in respect of any matters not provided for by such rules the Internal Security (Detained Persons) Rules, 1960 [L.N. 189/60; (Am. L.N 73/62)] shall apply to every place of detention and to all persons detained
D therein under this Ordinance.

(4) Whenever any person is detained under any order made under sub-section (1) he shall, in accordance with Article 151 of the Constitution, as soon as may be:

E (a) be informed of the grounds of this detention;

(b) subject to Clause (3) of the said Article (which provides that no authority may be required to disclose facts whose disclosure would in its opinion be against the national interest) be informed of the
F allegations of fact on which the order is based; and

(c) be given the opportunity of making representations against the order as soon as may be.

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[12] There are a number of cases which have set various parameters to the law and principle relating to preventive detention. Justice Abdul Malik Ishak has captured them eloquently in the article *Relationship Between The Federal and The State Government in times of Emergency and other related matters*
H *thereto — A General Perspective* (see [2005] 2 MLJ 1xxxii). In the same, amongst other things, the learned judge of the Court of Appeal observed:

Article 149 of the Federal Constitution empowers Parliament to make law against subversion and even to the extent of making law contrary to the fundamental
I liberties of the person irrespective of whether or not an emergency has been proclaimed. Only Parliament can make law under art 149 of the Federal Constitution. And law made under art 149 of the Federal Constitution is considered valid notwithstanding that it may be inconsistent with art 5 (which guarantees the liberty of the person), art 9 (which prohibits banishment of citizens and guarantees freedom of movement) or even art 10 (which guarantees freedom

of speech, assembly and association). Law made under art 149 of the Federal Constitution is valid even if it is made outside Parliament's competence. Article 149 of the Federal Constitution is worded as follows:

> Legislation against subversion, action prejudicial to public order, etc.
>
> 149(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —
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> (i) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
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> (ii) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
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> (iii) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
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> (iv) to procure the alteration, otherwise than by lawful means, of anything by law established; or
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> (v) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
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> (vi) which is prejudicial to public order in, or the security of the Federation or any part thereof.
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> any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill ...

[13] There are numerous apex court decisions relating to preventive detentions which have held in immutable terms that it is within the subjective discretion of the executive or enforcement agencies to decide whether a person ought to be detained:

(1) In *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 2 MLJ 129, the Federal Court held that: (a) the defect (if any) in the detention order in setting out the objects and purposes of the detention in the alternative was a defect of form only and not of substance, it did not show that the executive had not adequately applied its mind to the desirability of detaining the appellant and therefore did not invalidate the order; (b) the vagueness, insufficiency or irrelevance of the allegations of fact supplied to the appellant did not relate back to the order of detention and could not render unlawful detention under a valid order of detention; if, however,

A the appellant thought that the allegations were vague, insufficient or irrelevant he should have asked for particulars; (c) the question whether there was reasonable cause to detain the appellant was a matter of opinion and policy, a decision which could only be taken by the executive.

B Suffian FJ (as he then was) observed:

> The vagueness, insufficiency or irrelevance of the allegations of fact supplied do not relate back to the order of detention, do not go to the root of the order of detention and do not render unlawful detention under a valid order of detention. Still less do they do so if such vagueness, etc, in no way hinders or prejudices the detainee's right of making representations against the order of detention.
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> If the detainee honestly thinks that the allegations of fact are vague, insufficient or irrelevant, he should ask for particulars. Unlike his counterpart in India, he has here a legal right to particulars, subject to the Minister's privilege in the public interest.
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> In any event it is not for the court to judge the vagueness, sufficiency or relevance of the allegations of fact on which an order of detention is based. It is for the executive to do so.
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> The law here is different from that in India.
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> Here the power of detention is entrusted to the highest authority in the land acting on the advice of Ministers responsible to and accountable in Parliament. In India it is entrusted to comparatively minor officials. Strict compliance with procedure is therefore necessary. It is also necessary for another reason. Article 21 of the Indian Constitution provides that no person shall be deprived of his personal liberty except according to procedure established by law. In contrast, cl (1) of our art 5 provides simply that no person shall be deprived of his personal liberty save in accordance with law — without any mention of procedure.

[14] Gill FJ (as he then was) opined:

> There is ample authority for the proposition that it is not the function of the court to act as a court of appeal from the discretionary decision of the Cabinet and to inquire into the grounds upon which they came to the belief that it was necessary or desirable in the interests of the security of Malaysia to hold the appellant in detention (see *The King v Secretary of State for Home Affairs, Ex parte Lees* [1941] 1 KB 72). As was stated by Lord Atkinson in *Rex v Halliday* [1917] AC 260, it must not be assumed that the powers conferred upon the executive by the statute will be abused. His Lordship went on to say (at p 275):
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> And as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof.

[15] Ali FJ (as he then was) stated:

> Lastly, there is also the appellant's affidavit in which he categorically denies each and every one of the allegations of fact and contends in each case that even if the allegation is true, it cannot constitute a threat to the past or future security of Malaysia. In this connection, I shall be content to say that in habeas corpus proceedings, such as this, the court is not concerned with the truthfulness or otherwise of the allegations because the question whether it is necessary that a person be detained under s 8(1)(a) of the Internal Security Act 1960 is a matter for the personal or subjective satisfaction of the executive authority. Accordingly, no consideration can be given to the appellant's denial and no opinion need be expressed on his contentions.

(2) In *Minister for Home Affairs, Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29, Abdul Hamid AG LP (as he then was) observed:

> In our view the crux of the matter here is whether the learned judge in the present case took the correct approach to the question posed before him and has been time and again followed by the courts in this country (see *Liversidge v Anderson* [1942] AC 206 followed in *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129 and *Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182). In other words, reasonable cause is something which exists solely in the mind of the Minister of Home Affairs and that he alone can decide and it is not subject to challenge or judicial review unless it can be shown that he does not hold the opinion which he professes to hold ...

[16] A number of recent cases have advocated legal jurisprudence to ensure that civil liberties and human right values are respected by the executives and/or enforcement agencies. Some of them are as follows:

(a) In *Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368, Hishamudin J said

> In dealing with art 5(3) of the Constitution, I am mindful of the fact that I am presently dealing with the fundamental liberty of the citizens. The preservation of the personal liberty of the individual is a sacred universal value of all civilised nations and is enshrined in the Universal Declaration of Human Rights and Fundamental Freedoms of 1948. Article 5(3) of the Federal Constitution guarantees every person in this country of his personal liberty and protection from arbitrary arrest particularly arbitrary arrest by the State. As I have said in *Abdul Ghani Haroon (No 3)*, and I will say it again now, judges are protectors of the fundamental liberties of the citizens and that this is a sacred duty or trust which judges must constantly uphold.

(b) In *Abdul Ghani Haroon v Ketua Polis Negara and another application* [2001] 2 MLJ 689, Mohd Hishamudin J referred to

A the judgment of Lord Atkin in *Liversidge v Sir John Anderson & Anor* [1942] AC 206 where it was said as follows:

> I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

[17] The learned judge in the same case referred also to words of Sutherland J in *Associated Press v National Labour Relations Board* [1937] 301 US 103 as follows:

> ... the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.

[18] I have heard the evidence, read the documents and submission of the parties in detail. I take the view the plaintiff's claim must be dismissed. My reasons are as follows:

(a) It is trite that the police under EO 1969 are given quasi judicial powers to detain a person. There is very little the court can do to disturb their subjective discretion to arrest and detain unless procedural safe guards provided under the Federal Constitution are breached and/or the act of detention is spiked with malice. In the instant case, the main complaint is that the complainant was not given grounds for his arrest and thereafter grounds for his continuous detention. I will say that there is a greater duty and obligation on the enforcement agencies when dealing with preventive detention, to make sure adequate grounds and where necessary facts leading to the grounds are furnished at the time of arrest or soon thereafter. Courts at the present era of civil liberties, human rights values and constitutional awareness as a general rule, will jealously guard this constitutional requirement in all preventive detention cases to ensure that the liberty of the subject is not ordinarily trespassed. Further, only through the grounds and the facts leading to the arrest can court, where necessary, critically evaluate the bona fide of the arrest, in relation to EO 1969. To demonstrate that the procedural requirements are not breached, it will be prudent for the detaining authority to give access to solicitors within reasonable time. What is reasonable time is a question of fact. When ordinary citizen inclusive of

government servants, professional, etc, who do not have criminal records and who cannot per se be said to be a threat to public order or like must be given immediate access, within 24 hours, which I say will not be unreasonable to give life to constitutional safe guards. In case of a person who can be classified as criminal in the right perspective like organised syndicates, etc, access to counsel may exceed 24 hours but even then they must be given access to counsel as soon as possible and the delay if challenged in court, ought to be explained.

[19] If all procedural requirements have been fairly dealt with then there is very little the detained person can complain of, when it involves preventive detention. Preventive detention is now seen as a social evil and blatant abuse of human rights values, and there is much literature though some of them do not propagate balanced view. However, in the Malaysian context, it is a constitutionally recognised form of restriction to civil liberty in addition to penal laws and is seen as a necessary armoury for law enforcement agencies to ensure peace, prosperity and harmony of the nation at the expense of selective individual. That does not mean that the constitution has not given powers to court to arrest any form of injustice, by issuing prerogative orders or direction to arrest any form of injustice occasioned by executive or law enforcement agencies (see *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007] 5 MLJ 441; [2007] 4 AMR 472). Thus, within the constitutional framework there is a balance; it is only a matter of the court to, where necessary, move to arrest the wrong and advance the remedy to be held to the oath of office of His Majesty's judges, which is a legitimate expectation of the public within the spirit and intent of the Federal Constitution. Cases in this area of law which does not take into account growing concern of human rights values, must be expeditiously struck down by the apex court to ensure more respect and recognition is given to individual liberties as enshrined in the Federal Constitution, and also in recognition of Malaysia being signatory to the relevant International Convention on Human Rights. This does not mean that the High Court is restricted by the doctrine of judicial precedent to take the revolutionary measures within the parameters of legal jurisprudence to advance justice (see HRH Raja Nazrin Shah — speech at Judges Conference on 9 April 2008 relating to judicial precedent (see *Re Haji Khalid bin Abdullah; ex parte Danaharta Urus Sdn Bhd* [2008] 2 CLJ 326; [2007] 6 AMR 694). For example, though a court may not want to disturb the subjective discretion of executive and/or enforcement agencies, the court is empowered to define the parameters of the definition of public order or national security, or its like to ensure that the detaining authorities do not interpret the said phrase as a cure for all maladies and exercise their subjective discretion arbitrarily. By doing so, the court will be in a position to ensure fair detention under the preventive laws within the much desired values of civil liberties and human rights values.

[20] In the instant case, I am satisfied that the defendants have adequately furnished grounds of arrest and have given immediate access to solicitors. If the plaintiff's allegation is true the solicitors would have immediately written letters complaining that the grounds for arrest were not given. If the plaintiff has been aggrieved that the arrest was mala fide, and did not comply with procedural safe guards, they would have lodged a complaint with the court for the issue of writ of habeas corpus. In this case, it was not done.

[21] In this case, in evidence the plaintiff complains that during the period of detention, he was handcuffed most of the time and badly treated. However, it was not the plaintiff's pleaded case. In consequence, there is nothing much the court can do save to say as follows: (i) the right to detain under the preventive detention law do not give the right to abuse the detainee under custody; (ii) when a person is detained, he is entitled as of right to food, shelter, medical care, etc. Court has jurisdiction to enquire, into any complaint of detainee, if adequate humanitarian provision is not made by detaining authority; (iii) there is a duty of care imposed on the enforcement agencies to ensure that detainees are well taken care of, failing which they can be liable to damages and if the detainees are victims of abuse, criminal prosecution inclusive of disciplinary proceedings enquiry may be ordered against the perpetrators.

[22] For reasons stated above, I dismiss the plaintiff's action with no order as to costs.

I hereby order so.

Plaintiff's action dismissed.

Reported by Andrew Christopher Simon